Coastal
The Energy People

August 25, 2000

Ms. Yasmin Yorker
Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance) [65 Federal Register 39,650, June 27, 2000].

The Coastal Corporation (Coastal) is a Houston-based energy holding company with consolidated assets of more than $12 billion and subsidiary operations in natural gas transmission, storage, gathering/processing and marketing; petroleum refining, marketing and distribution; chemicals; oil and gas exploration and production; power production; and coal. Coastal values this opportunity to provide comments on the Environmental Protection Agency's (EPA) revised draft agency guidance on Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance).

In general, Coastal supports comments presented by the Business Network for Environmental Justice (BNEJ) for this issue. We echo BNEJ's commendations on the significant improvements reflected in the revised guidance, and we appreciate the Agency's efforts to make the guidance fair and workable for all. We would, however, like to address a few points of concern to us, which are not fully addressed in BNEJ's comments.

We agree with the BNEJ assessment that Congress never intended for this civil rights law to be used for prohibiting unintentional disparities in environmental quality. As with BNEJ, we strongly believe that by mandating equality of results, regardless of intent, EPA's guidance far exceeds the limits established by the Supreme Court.

Moreover, this approach is entirely unworkable. For more than two decades, the Supreme Court has clearly held that the protections against racial discrimination embodied in the Constitution and Title VI apply to *all* races -- including whites. *See, e.g., University of California Regents v. Bakke*, 438 U.S. 265 (1978); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Therefore, if a facility were to locate in an area with a higher white population than the community as a whole, then the white members of that community would have every right to assert a claim under EPA's guidance. Indeed, under EPA's sweeping, results-oriented approach, the only way to forestall an environmental justice claim would be to locate any new facilities in

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an area that precisely mimics the racial makeup of the community as a whole. As this will prove impossible -- especially since the guidance itself does not identify the extent of the overall "community" to which the affected area must be compared -- the guidance will inevitably lead to a series of "NIMBY" claims, not true environmental equality. This is precisely why the courts do not mandate equality of results.

Yet another concern is the lack of any connection between the cause of existing environmental inequities and the remedy sought. The Supreme Court has made it clear that, when governmental agencies are allowed to make race-based efforts to redress past discrimination, that discrimination must be traceable to that agency's own actions. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 288 (1986) (O'Connor, concurring). Mere "societal discrimination" does not pass constitutional muster. *Id.*

Here, it is difficult to see how EPA and the State environmental agencies in any way caused the social inequities the guidance attempts to remedy. These agencies have never forced companies to locate in minority areas; indeed, *these agencies have historically had little to no power to control siting decisions*, or to impose different emissions limitations depending on whether the facility is located in a minority area or a white area. Rather, companies select locations for many reasons completely unrelated to race, including existing zoning, cost of the property, location near major transportation routes/suppliers/users, etc. These same characteristics render these areas less desirable to live in, which in turn can lead to a higher percentage of poor households than in more desirable areas -- and since America's minority populations tend to be disproportionately poor, it should not be surprising that in some cases, they are disproportionately represented in these industrial areas.

While the societal problems that can lead to these results are certainly serious, they are just that: societal problems. They were not caused by the companies' business decisions, nor by the environmental agencies' permitting decisions. This is precisely the kind of societal discrimination that cannot justify race-based remedies.

The procedural aspects of the guidance also leave much to be desired. As we understand the revised guidance, EPA will neither notify permittees of pending complaints nor require the recipients to do so. We strongly disagree with this proposed process, and agree with BNEJ's explanation of the significant benefits permittees can bring if they are allowed to participate in the process. We further believe that permittees have a *right* to participate.

It is the most basic tenet of administrative law that any "aggrieved party" has the legal right to participate in administrative actions potentially affecting its interests and appeal any adverse decision. Certainly, if EPA or a State permitting agency were to directly deny a permit application, or imposes untenable permit conditions, the permittee would have an undisputed right to participate in the agency's review process, and to appeal any adverse decision under the federal or state Administrative Procedures Act (APA).

Here, EPA proposes an entirely new administrative process that could have *precisely* the same impacts on the permittee. While the guidance makes it clear that denial of a particular permit, or imposing additional controls on a certain project, will not necessarily be the proper response to any disparity that is found, the guidance does clearly state that those options remain available. Yet the guidance gives no right to the affected facility to participate in an action that undisputedly could deprive it of its permits, or significantly change the conditions under which it is allowed to operate. We believe that denying the permittee the right to participate in such an important

agency process violates the APA and possibly due process. We recommend that EPA address this significant problem by providing an express right for potentially affected permittees to participate in the process.

Our final issue of concern relates to the disparate burden of proof. EPA repeatedly states that citizens do not have the burden of production or persuasion, because EPA's investigation is not a litigation process where each side must meet these burdens in order to proceed; rather, here, EPA has an independent duty to investigate and determine the truth. Yet EPA just as consistently states that the receiving agency holds the burden to prove justification. This inconsistency cannot stand: either EPA has an obligation to independently investigate and determine the truth, or it does not. If the former, then the agency must fully and fairly investigate and evaluate the facts supporting the positions of *both* the citizens and the permitting agency. If the latter, then *both* the citizens and the permitting agency must bring forth sufficient facts to prove their claims. EPA cannot simply adopt an "independent investigation" posture to relieve the burden on citizens, then ignore that position to compel permitting agencies and permittees to prove their claims.

Again, we are pleased at the significant improvements that have been made since the original guidance document was published in 1998. We appreciate this opportunity to submit our comments and recognize EPA's efforts to improve stakeholder outreach, dialogue, and participation over the last two years.

Sincerely,

Khalid A. Muslih

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